

ESTTA Tracking number: **ESTTA626855**

Filing date: **09/12/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91208003
Party	Defendant Michael F. Ball
Correspondence Address	CASIMIR W. COOK OLIFF PLC 277 SOUTH WASHINGTON STREET, SUITE 500 ALEXANDRIA, VA 22314 UNITED STATES CCook@oliff.com, TrademarkGroup@oliff.com
Submission	Answer
Filer's Name	Casimir W. Cook II
Filer's e-mail	CCook@oliff.com, TrademarkGroup@oliff.com, email@oliff.com
Signature	/Casimir Cook/
Date	09/12/2014
Attachments	161786 - Answer and Affirmative Defenses.pdf(20651 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

RED BULL GMBH,)	
)	
Opposer,)	
)	
vs.)	Consolidated Opposition No. 91208003
)	
MICHAEL F. BALL,)	Opposition No. 91208003 (Parent)
)	Opposition No. 91214448 (Child)
Applicant.)	
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ANSWER AND AFFIRMATIVE DEFENSES TO NOTICE OF OPPOSITION

Michael F. Ball ("Applicant") hereby answers the Notice of Opposition of U.S. Trademark Application Serial No. 85/400,948 in the above-identified proceeding as follows:

Applicant denies that Red Bull GmbH ("Opposer") will be damaged by the registration of its mark +RED POWER ELIXIR shown in its U.S. Trademark Application Serial No. 85/400,948 and answers the numbered paragraphs of the Notice of Opposition as set forth below:

1. Applicant admits that Opposer is engaged in the energy drink industry. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in numbered paragraph 1 of the Notice of Opposition and therefore denies same.

2. Applicant admits that Opposer claims ownership of the corporate name, trade name and trademark RED BULL. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in the second numbered paragraph of the Notice of Opposition and therefore denies same.

3. Applicant admits that the third numbered paragraph of the Notice of Opposition purports to reflect U.S. Registration No. 3,939,863 as registered on April 5, 2011 for "energy drinks and soft drinks," in Int'l Class 32 and that Exhibit 1 purports to contain an excerpt from the USPTO's TSDR database. Applicant admits that the USPTO's TSDR database identifies Opposer as the current owner of Reg. No. 3,939,863, but lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the third numbered paragraph of the Notice of Opposition and therefore denies the same.

4. Applicant admits that the fourth numbered paragraph of the Notice of Opposition purports to reflect U.S. Registration No. 2,494,093 for "energy drinks and soft drinks," in Int'l Class 32. Applicant admits that U.S. Registration No. 2,494,093 was registered on April 5, 2011, renewed on November 23, 2011 and that a Section 15 Declaration of Incontestability was acknowledged on December 29, 2012. Applicant also admits that Exhibit 1 purports to contain an excerpt from the USPTO's TSDR database. Applicant admits that the USPTO's TSDR database identifies Opposer as the current owner of Reg. No. 2,494,093, but lacks knowledge or

information sufficient to form a belief as to the truth of the remaining allegations contained in the fourth numbered paragraph of the Notice of Opposition and therefore denies the same.

5. Applicant admits that the fifth numbered paragraph of the Notice of Opposition purports to reflect U.S. Registration No. 3,092,197 for "Non-alcoholic beverages, namely energy drinks and hypertonic drinks," in Int'l Class 32. Applicant admits that U.S. Registration No. 3,092,197 was registered on May 16, 2006 and that a Combined Section 8 and 15 Declaration was accepted and acknowledged on March 10, 2012. Applicant also admits that Exhibit 1 purports to contain an excerpt from the USPTO's TSDR database. Applicant admits that the USPTO's TSDR database identifies Opposer as the current owner of Reg. No. 3,092,197, but lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the fifth numbered paragraph of the Notice of Opposition and therefore denies the same.

6. Applicant denies that Opposer has any rights to its alleged RED mark. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the sixth numbered paragraph of the Notice of Opposition and therefore denies the same.

7. Applicant denies that Opposer's alleged RED mark has been or is currently in use in interstate commerce. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the seventh numbered paragraph of the Notice of Opposition and therefore denies the same.

8. Applicant denies that the alleged RED mark is an asset of Opposer and/or identifies Opposer or Opposer's goods. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the eighth numbered paragraph of the Notice of Opposition and therefore denies the same.

9. Applicant denies that the alleged RED mark is advertised by Opposer in the United States and/or throughout the world. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the ninth numbered paragraph of the Notice of Opposition and therefore denies the same.

10. Applicant denies that any of Opposer's 2012 sales are attributable to the alleged RED mark and that the alleged RED mark is famous. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the tenth numbered paragraph of the Notice of Opposition and therefore denies the same.

11. Admitted.

12. Admitted.

13. Applicant realleges and incorporates by reference its answers to numbered paragraphs 1-12 of the Notice of Opposition as if set forth fully herein.

14. Denied.

- 15. Admitted.
- 16. Denied.
- 17. Denied.
- 18. Denied.

AFFIRMATIVE DEFENSES

19. Opposer's marks pled in its Notice of Opposition ("Opposer's Marks") are diluted and therefore weak and entitled to only a narrow scope of protection, if any, because numerous third parties have used, applied to register and registered in the USPTO marks and other designations comprising or incorporating the letters RED, including the use, and application for registration and registration in the USPTO of such marks in connection with goods and/or services commercially related to Opposer's Marks. Accordingly, given the distinct differences in the marks at issue in this proceeding, Opposer's Marks are not entitled to a scope of protection sufficiently broad so as to encompass Applicant's opposed mark.

* * * * *

WHEREFORE, Applicant prays as follows:

- (a) that this Opposition be dismissed; and
- (b) that the opposed U.S. Trademark Application Serial No. 85/400,948 proceed to allowance.

Please direct all notices, pleadings and process regarding this matter to:

Casimir W. Cook II
OLIFF PLC
277 South Washington Street
Suite 500
Alexandria, Virginia 22314
Telephone: (703) 836-6400
Facsimile: (703) 836-2787
Email: ccook@oliff.com;
TrademarkGroup@oliff.com.

Respectfully submitted,

Michael F. Ball

OLIFF PLC

Dated: September 12, 2014

By: /Casimir Cook/
Casimir W. Cook II

Attorneys for Applicant

CERTIFICATE OF SERVICE

On September 12, 2014, I served the foregoing **ANSWER AND AFFIRMATIVE DEFENSES TO NOTICE OF OPPOSITION** on the parties in said action by depositing a true copy thereof with the United States Postal Service with first-class postage prepaid, at Alexandria, Virginia, enclosed in a sealed envelope addressed as follows:

MARTIN R GREENSTEIN
TECHMARK A LAW CORPORATION
4820 HARWOOD ROAD, 2ND FLOOR
SAN JOSE, CA 95124
UNITED STATES

Dated: September 12, 2014

By: /Casimir Cook/
Casimir W. Cook II